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May 9, 2006

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Mr. Vernon Williams, Secretary  
Surface Transportation Board  
1925 K Street, N.W., Room 713  
Washington, D.C. 20036

Re: City of Jersey City, et al – Petition for a Declaratory Order – Finance Docket 34818.

Dear Mr. Williams:

Enclosed please find eleven copies of the Rebuttal Statement of Petitioners City of Jersey City, *et al.* These copies contain facsimile signatures. The signed original documents are being sent to you via overnight mail for delivery tomorrow.

Please feel free to contact me at (202) 974-5142, if you have any questions or need any additional information concerning these filings.

Very truly yours,

Andrea C. Ferster, General Counsel  
Rails to Trails Conservancy

Enc.

216520

BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 34818

City of Jersey City,  
Rails to Trails Conservancy,  
Pennsylvania Railroad Harsimus Stem  
Embankment Preservation Coalition,  
and New Jersey State Assemblyman Louis M. Manzo  
Petition for a Declaratory Order



REBUTTAL STATEMENT  
of

PETITIONERS CITY OF JERSEY CITY,  
RAILS TO TRAILS CONSERVANCY,  
PENNSYLVANIA RAILROAD HARSIMUS STEM  
EMBANKMENT PRESERVATION COALITION, and  
NEW JERSEY STATE ASSEMBLYMAN LOUIS M. MANZO

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Introduction

As provided in this Board's order in this proceeding served February 8, 2006, Petitioners City of Jersey City, Coalition, Rails to Trails Conservancy, and Assemblyman Manzo (hereinafter collectively referred to as "City,"<sup>1</sup> or "petitioners") provide this Rebuttal Statement in response to the Replies filed by 211 Marin Blvd., LLC et al. ("SLH" or "the developer") and Consolidated Rail Corporation ("Conrail").

After a brief summary, we will discuss the Conrail/SLH claims in two basic parts. Part I will deal with claims that Jersey City misreads the Final System Plan (FSP), or the FSP is wrong or

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<sup>1</sup> In some cases, hopefully clear from the context, the word "City" will refer only to City of Jersey City.

intends something else from what it says, or that Conrail is otherwise its own abandonment agency. Part II will deal with claims by Conrail and the developer that Jersey City somehow was complicit in Conrail's illegal abandonment and that no one is therefore entitled to the protections Congress has provided when railroads abandon their lines.

#### Summary

Once one wades through the obfuscation and rhetoric, Conrail and SLH do not appear to dispute the basic proposition that de facto abandonment of rail lines is illegal in the United States. This proposition being admitted, the petition of Jersey City, et al. must be granted, because the following facts are undisputed:

(1) No railroad, including Conrail, either sought or obtained abandonment authority for the part of the Harsimus Branch at issue here (Waldo to Luis Munoz Marin Blvd, formerly known as Henderson Street) from either the Interstate Commerce Commission (ICC) or its successor, this Board.

(2) Before its transfer to Conrail, the Harsimus Branch was the freight terminus of the Pennsylvania Railroad and clearly a "line of railroad" subject to the federal requirement for prior abandonment authorization.

(3) The United States Railroad Administration ("USRA") ordered "Line Code 1420," called the "Harsimus Branch," from MP 1.0 to MP 7.0 transferred to Conrail as a "line of railroad." Final System Plan (FSP), p. 272.<sup>2</sup> USRA in its FSP unequivocally states that it relied on track charts to define what was in the various line codes.<sup>3</sup>

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<sup>2</sup> Petitioners Opening Statement ("JC Op.") Appendix VIII.

<sup>3</sup> USRA in its FSP at p. 241 explained that the Penn Central Engineering Department had assigned a "unique four digit code, called a line code to each individual railroad line." USRA

(4) The relevant deed to Conrail for "line code 1420" shows the portion of the Harsimus Branch at issue here (Waldo to former Henderson Street) on the map pages for what appears to be MP 2 (showing Waldo Avenue) and MP 1 (Henderson),<sup>4</sup> and clearly conveys the portion of the Branch involved here as a "line of railroad" to Conrail.<sup>5</sup>

(5) All the relevant track charts from the 1965 Pennsylvania Railroad track chart through Conrail's 1980 track chart show Waldo as approximately MP 2.54 and Henderson Street as approximately MP 1.3. Indeed, every track chart from before the transfer to Conrail until 1982 -- six years after the transfer -- that is labeled "Harsimus Branch" or "Line Code 1420" that any party (Conrail, SLH, or Jersey City) has produced in this proceeding shows that Henderson Street and

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explained that "[t]he most useful tool" for determining what was covered by a line code "was the railroad track charts which depict the route of each line of railroad including milepost locations, highway grade crossings, grade crossings with other lines of railroad, connections to other lines of railroad, overhead bridges, and other engineering data." FSP p. 241. Naturally, then, one should look at the track charts for "line code 1420" extant around the time of transfer of the Harsimus Branch to Conrail.

<sup>4</sup> The deed is in JC Op. Appendix XVI, and is discussed in detail in John Curley's Verified Statement (JC Op. App. XV). The relevant maps are included in Appendix XVI. All are labeled "L C 1420." They begin with a map labeled "L C. 1420 - 1.0, and "L C 1420 MP 1.0. The map also bears an stamped pagination "0145" near the other referenced labels. This map shows rail property terminating on the Hudson River. Former Henderson Street is well west of the River. The map for L C 1420-2 (paginated "0146") shows Waldo Avenue (cross point Waldo). The other maps continue the line through the Meadows yard (labeled MP 5.5). At the Meadows Yard, the Harsimus parallels line code 1421, the Passaic Branch. The point is that the description in the deed and the relevant maps clearly shows a "Line Code 1420" and "Harsimus Branch" property that encompasses Waldo to (former) Henderson Street in line code 1420 between MP 1 and MP 3.

<sup>5</sup> Exhibit A to the Fairfax Leary deed to Conrail (see JC Op. App. XVI, page labeled in upper right "0093") states that the "line of railroad" known as the Harsimus Branch originates in the Cove and terminates near the junction with the Penn Central New York - Philadelphia main line.

Waldo lie between MP 1.0 to MP 7.0.<sup>6</sup>

(6) The Harsimus Branch involved here was used by over a half dozen shippers with over 3000 carloadings in or out per year as late as September 1984,<sup>7</sup> and the line was profitable to Conrail.<sup>8</sup> The last rail use was in approximately 1992.

(7) The Embankment portion of the Harsimus Branch was listed on the New Jersey State Register of Historic Places in 1999, and was determined eligible for the National Register of Historic Places in 2000.<sup>9</sup> As such, it is protected by section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f.

(8) Public officials have sought to acquire the property from Conrail for preservation since Mayor Cunningham's election in 2001.<sup>10</sup> City of Jersey City has arranged financing sufficient to match the bid by SLH.<sup>11</sup>

(9) In 2005, Conrail nonetheless purported to sell the

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<sup>6</sup> E.g., SLH Reply Statement at Exhibit L (shows Henderson at about MP 1.3, with higher numbers in direction of Waldo); Conrail Reply at Exhibit E (same); Jersey City Opening Statement at Appendix IX [Pennsylvania RR (1965), Conrail (1/1/76), Conrail (1/1/77, updated 5/5/78), Conrail (1-1-80)].

<sup>7</sup> See NJ Op. App. I, document paginated "055."

<sup>8</sup> Id. document paginated "053."

<sup>9</sup> JC Petition, Exhibit H (various documents). See also id. Exhibit C, ¶ 6.

<sup>10</sup> Conrail and its witness Ryan wrongfully portray the first written contact as "late 2003." Conrail Reply at 5, Conrail's Ryan Exhibit at p. 16, para 27. In fact, the record contains a letter from Mayor Cunningham to Conrail's Ryan supporting preservation on March 10, 2003 (included in JC Op. App. III along with about twenty other letters from US Senators, Congressmen, Assemblymen, Councilmen, neighborhood associations, and private conservation organizations supporting preservation of the embankment. The Mayor wrote again in October 2003. Ryan and Conrail need at least to look at all of our exhibits.

<sup>11</sup> E.g., JC Op. Appendix VII (Mr. Corrado describes funding sources in ¶5).

Harsimus Branch at issue here to SLH to break up into houses and not for any kind of rail use.

From the above facts, there is only one possible conclusion: Conrail was deeded a line of railroad; Conrail in any event operated what it got as a line of railroad for many years; Conrail in either event needs abandonment authority in order lawfully to abandon the Harsimus Branch from former Henderson Street (roughly MP 1.3 on the track charts presented by Jersey City in this proceeding) to Waldo (roughly MP 2.54 on same); and Conrail thus unlawfully sold the Harsimus Branch to SLH. By its unlawful action, Conrail wrongfully avoided compliance with section 106 of the NHPA, and wrongfully deprived the City and other public agencies of protections under federal law<sup>12</sup> and State law<sup>13</sup> that would otherwise apply to assist them in securing the property for open space and preservation.

Everything else Conrail and SLH pour into the record in their Replies is irrelevant, immaterial, misleading, or pure conjecture

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<sup>12</sup> For example, under 49 U.S.C. § 10905 and 49 C.F.R. § 1152.28, Jersey City, Rails to Trails, the Coalition, or any other interested public user could have obtained a public use condition barring sale to SLH for 180 days in order to allow City to implement eminent domain against Conrail prior to sale. That is a key purpose of section 10905. In addition, STB would have barred Conrail from disposing of the historic Embankment at all until compliance with section 106 of the NHPA.

<sup>13</sup> Under NJSA 48:12-125-1, Jersey City would have a 90 day window to acquire the property had Conrail complied with applicable federal abandonment procedures. See J.S. Op. Appendix XV (Curley expert opinion, ¶5).

or raw assertion unsupported by evidence or directly belied by the law or contemporaneous documents.

1. Conrail/Developer USRA Arguments Are Without Merit

The best word to describe the arguments made by Conrail/SLH is "obfuscation." This case turns out to be very simple. Indeed, once one clears away the smoke and mirrors, Conrail has no case.

1. Conrail/SLH claims about USRA intent. Conrail and SLH make various claims that USRA did not intend to convey the Harsimus Branch as a "line of railroad." But the best evidence of what USRA intended is what USRA said. At FSP p. 272, USRA said it was designating the Harsimus Branch to Conrail as a line of railroad. The Fairfax Leary deed calls it a "line of railroad." The relevant track charts corroborate this. The maps associated with the deed show the portion at issue here (Waldo to former Henderson) as a classic railroad right of way.<sup>14</sup>

2. SLH ignores what is relevant and relies on baseless speculation. SLH ignores the track charts and Fairfax Leary deed and makes totally fabricated assertions about what USRA included in

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<sup>14</sup> Petitioners dispatched a team to National Archives to go over all the relevant USRA files, including those which Conrail or SLH witnesses claim to have reviewed. To make a long story short, there is nothing in the National Archives as reviewed by City, Conrail, or SLH witnesses that supports Conrail or SLH claims that USRA intended to convey the Harsimus Branch at issue here as "ancillary" to a line of railroad, nor do the NARA files indicate that Waldo to former Henderson Street was not part of the Harsimus Branch designated to Conrail at FSP 272. See Supplemental Declaration of Andrew Strauss, attachment D.

the Harsimus Branch. At pp. 13-14 of its Reply, it asserts that Jersey City is ignoring the milepost designations. This is absurd. The author of Jersey City's petition for a declaratory order reads valuation section maps and track charts practically for a living, and certainly has done everything in his power to ensure that Jersey City and its co-petitioners scrupulously pay attention to milepost designations. The problem is that developer and Conrail are mixing milepost designations up. The relevant designations are those that USRA said are relevant. USRA, as we tire of repeating, stated in its FSP that it was relying on track charts for various line codes. All those show the Harsimus Branch commencing at the Cove at MP 1.0, and carrying on westward to MP 7.0. The Fairfax Leary deed is consistent with those track charts.

After accusing us of misreading USRA, SLH backhandedly admits that Jersey City is correct in its reading of what USRA intended. In particular, SLH says that its witness Hasselman "explains how the drafters of the Final System Plan might easily have been mistaken in referring to the Passaic and Harsimus Line as the 'Harsimus Branch.'" SLH Rep. at 14. Hasselman spills a number of words claiming that the only line Penn Central operated was the "Passaic and Harsimus Line." But the best evidence is what USRA did. USRA at p. 272 provided for conveyance of line code 1420 known as the Harsimus Branch, and of line code 1421 known as the Passaic Branch. The Fairfax Leary deed to Conrail also treats the



two branches separately. What Hasselman claims that Penn Central called its property for operational purposes is not relevant for what USRA designated for conveyance to Conrail, except to the extent USRA in the FSP indicated. USRA, after all, was not trying to reconstitute Penn Central or any other road in its FSP.

What USRA indicated was it was relying on track charts. All the track charts and the relevant deed show exactly what Jersey City says they show, and are nothing close to the claims of SLH or its witnesses.

SLH also presents a Declaration by John Heffner, who states he visited the National Archives with SLH's counsel, and saw valuation section like maps with engineering stations (but not mileposts). SLH in its brief asserts that Waldo corresponds to MP 0 on these maps, and Mr. Heffner states that the developer's property would then be between MP 0.18 and MP 0.88 with the Hudson River at MP 1.48. Heffner reasons that 0.18 and 0.88 cannot be part of MP 1 to MP 7 conveyed to Conrail, and SLH seems to argue (pp. 15-16) that USRA just made a mistake in including any of the Embankment in the Harsimus Branch. Both Heffner and SLH are wrong.

USRA, as we have said, relied on track charts of various line codes. The only track charts of the Harsimus Branch extant before and immediately after the designation to Conrail show the Harsimus Branch as starting at MP 1.0 at the Hudson River, and extending

westerly to Karny<sup>15</sup> and Harrison. MP 0 would be over near the destroyed World Trade Center and MP 0.18 to 0.88 would be in the Hudson River. The problem for both Heffner and SLH is they ignore the best evidence, and rely on the wrong maps.

The original valuation section maps for the Harsimus Branch did not employ any milepost numbers. One could extrapolate the engineering station calls as Heffner did, but the result is irrelevant, because that is clearly not what USRA did. The track charts and the Fairfax Leary deed show what USRA did.

Petitioners sent a team to Archives to review that maps, and our team reports that the Archives do not support any of the Conrail/SLH conjectures about what USRA intended.<sup>16</sup>

At p. 20 of its Reply, SLH says that Jersey City should have asked USRA by December 1, 1975, to correct the FSP if it wanted the Harsimus Branch MP 1 to MP 7 treated as a line of railroad. SLH then says the City acquiesced in some other status for the Harsimus Branch by not objecting. This is absurd. The FSP designated the entire Harsimus Branch as a "line of railroad." There was nothing more anyone had to do to ensure the line was transferred to Conrail as a "line of railroad." This is the case for all of the

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<sup>15</sup> Karny is sometimes spelled Kearny in the various railroad charts. The correct spelling is believe to be Kearny, after the Civil War general of that name.

<sup>16</sup> See Supplemental Declaration of Andrew Strauss, Attachment D.

properties designated to Conrail in the FSP as "lines." SLH has the matter exactly backwards. It is following the classic approach suggested for people who are caught: deny everything and loudly accuse the other guy.

3. SLH claims about "excepted track." SLH has a strange argument at p. 19 that seems to imply, citing a Mr. Hand, that the Harsimus Branch Embankment was conveyed as "excepted track." Mr. Hand in his statement says nothing of the sort. He notes that deeds to Conrail would except out certain track where Conrail was obtaining no real estate interest. That property obviously did not convey to Conrail (and as Conrail says in its Reply at 9 was automatically authorized by USRA for abandonment). The Harsimus Branch, however, was not excepted out of the deed, and Mr. Hand's rather convoluted statements at p. 5 of his Declaration seem to acknowledge this. The result is that SLH's argument at p. 19 is either gibberish, irrelevant, or totally belied by the record. Heffner in his statement at pp. 4-5 for SLH also claims that the Harsimus Branch was clearly "excepted track" but that is just patently wrong. It is belied by the opinion of a New Jersey land attorney on the meaning of the deed and what it covers as well as a title report (NJ Op. Appendix XV), and it is not supported by anything in the National Archives. Strauss, Attachment D. The Fairfax Leary deed quite clearly conveys exactly what we are discussing in this proceeding to Conrail as a "line of railroad."

The Embankment from former Henderson Street to Waldo is not excepted out. Heffner is mixing up irrelevant maps with what USRA in fact used, or is imposing numbers that USRA did not use on the maps that USRA did use.

4. Conrail/SLH claims about spur or yard status. Conrail and SLH at different spots in their Replies seek to treat the Harsimus Branch involved here as a part of the Harsimus Cove Yard. Conrail and SLH basically argue that USRA intended to convey the entire property only as a rail yard or spur, and that rail yards and spurs do not require any abandonment authorization.

The only mechanism for USRA to authorize an abandonment of a line (i.e., the cessation of common carrier obligations) was to not designate the property to Conrail as a line of railroad. We agree with Conrail in its Reply at p. 9 that if USRA did not designate the property to Conrail, then the property was authorized for abandonment (and eventual sale to satisfy creditors of the various bankrupt eastern railroads) by operation of law. That, however, was the only means by which USRA impacted otherwise applicable ICC jurisdiction over abandonments. If USRA designated property to Conrail as a line of railroad, the property was subject to ICC abandonment authority to the same extent it was prior to USRA. Thus, if the Pennsylvania Railroad, or its successor the Penn Central, would have required abandonment authority for the Harsimus Branch, so would Conrail.

Once a railroad is used as a line of railroad, it requires ICC (or STB) abandonment authority before it may be broken up for non-rail purposes. The mere fact that its use declines does not authorize a railroad arbitrarily to abandon it. As we said in our Opening Statement at p. 23, citing Phillips v. Denver & R.G. RR, 97 F.3d 1375 (10th Cir. 1996), lines of railroad cannot be deemed abandoned simply on the basis of non-use, even if there has been removal or disrepair of trackage and appurtenances.

But SLH and Conrail seem to argue that this Board should overturn this well-established rule. SLH cites witness Wulfhorst who says he felt the Harsimus Branch use had declined so much that he recommended that it not be designated as a line of railroad. SLH at p. 12. The short answer to this claim is that USRA quite obviously did not take Mr. Wulfhorst's recommendation.<sup>17</sup> SLH's witness McClellan states that he does not recall looking at any shipper data for the Harsimus Branch, and is "advised" that it was not designated as a line of railroad to be operated by Conrail, or suitable for subsidy by another. SLH Reply at p. 12. This is rampant bootstrapping. McClellan was clearly misadvised, evidently most recently by SLH's counsel. USRA designated the Harsimus Branch as a line of railroad. That is obvious from the FSP at p.

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<sup>17</sup> Actually, USRA did provide that a major portion of the Harsimus Cove yard be sold for development. However, there were many local shippers (even as late as 1984, the roughly mile and a half of line had over 3000 cars traversing it) and quite obviously was a line of railroad.

272, the relevant track charts (and USRA said in its FSP that those were what was relevant) and the relevant deed. Moreover, no one has claimed that this line was to be operated under some kind of subsidy under the FSP.

Contemporaneous Conrail documents show that the property in question in this proceeding, as encompassed by the Embankment, was serving 3000 plus carloads per year, and definitely was far more than a low or no density line when it was transferred to Conrail in 1976. But even if it were no- or low-density, it still would have required abandonment authority. This was no burden to Conrail. Congress specifically provided for expedited abandonment authority for Conrail to use on unprofitable lines in the Northeast Rail Service Act of 1981 (NERSA), 45 U.S.C. § 748. NERSA abandonments essentially were not subject to economic contest, and were only "regulated" by the availability of "offers of financial assistance." Conrail could invoke NERSA abandonment authority so long as it filed a notice of insufficient revenue ("NIF"). All NIFS had to be filed prior to November 1, 1985. See 45 U.S.C. § 748(c)(1). Conrail never filed one for this line, presumably because Conrail's analysis in early 1985 (see pages numbered "055" and "053" in JC Op. App. I) showed that the line was profitable, even after rehabilitation.

In the end, SLH simply asserts without support that the Harsimus Branch was not designated to be operated by a railroad in

the FSP. SLH Reply at 13. That is just false. To the extent SLH implies the line was not operated as a railroad by Conrail, SLH is again speaking falsehoods. Conrail's own documents show over 3000 carloadings from seven shippers for the 12 month period ending September 1984. SLH implies the line would have required subsidy (SLH Reply at 13 and n.8). This also is false. Conrail's own documents show the line was profitable as late as 1984.

There are three final points on this spur versus line issue. The first point is that even if this Board were to break with precedent and somehow view USRA as authorizing Conrail arbitrarily to treat what were lines of railroads as "spurs" upon transfer, Conrail used the Harsimus Branch from former Henderson Street all the way to Waldo as a line of railroad. Any mile of track with over 3000 carloadings of profitable local service to at least seven shippers from 1976 to 1984 has to be viewed as a rail line. Even if Conrail got the line as something it could use as a line or not, or as something other than a "line," for ICC/STB abandonment purposes, Conrail's own use for the next ten years would have converted what is at issue in this proceeding into a line of railroad subject to abandonment requirements.

Second, to the extent SLH or Conrail or their witnesses imply that this was just a mass of tracks without shippers, they are belied by the record. Conrail denied that it had any information on shipper use other than what it provided Jersey City in

discovery. Jersey City appended all that Conrail had as JC Op. Appendix I. This data makes clear that the Branch was profitable and had over 3000 shipments per year as of September 1984. Conrail and SLH have no rebuttal to this. The line obviously was a major line of railroad even at that late date. This Board has successfully resisted efforts by municipal governments to employ eminent domain even against minor pieces of similar dead-end branches with only a single shipper and a tiny fraction of such use on grounds that they are operating lines of railroad. E.g., City of Lincoln v. STB, 414 F.3d 858 (8th Cir. 2005).

Finally, in JC Op., we emphasized that Conrail treated its unused "High Line" over in Manhattan as a line of railroad, insisting that the line was subject to federal abandonment jurisdiction. In its Reply at p. 7, Conrail says that Chelsea Property Owners -- Abandonment, 8 ICC2d 773 (1992) is not controlling because Conrail "indisputably" acquired the High Line as a line of railroad. But the basis for Conrail's adverb "indisputably" is that the FSP designated it as a line of railroad, just as does the FSP here. Conrail in the end is simply claiming the power to determine for itself when to abandon its lines. This it may not do. The Harsimus Branch had far more use by Conrail as a line of railroad than the High Line in Manhattan, and both were designated as "lines" to Conrail. As between the two, if one is subject to ICC/STB abandonment jurisdiction, then so must they



both. There is no legitimate distinction between the two, except that the Harsimus Branch had much more rail use.

5. There is no severance. SLH in its Reply at p. 4 seems to claim that the Branch is question here is severed from any connection to that national freight rail system. But the line interconnects with an existing freight rail line at Waldo. See Jersey City Petition, Exhibit E (Richard James Verified Statement) ¶4. In addition, the undersigned counsel personally inspected the line on April 21, 2006 and confirmed the connection. There is no severance.

6. SLH references to "Passaic and Harsimus Branch" highlight a gaping hole in the Conrail/SLH claims. In SLH's struggle to confuse the issue of Mileposts 1.0 to 7.0 on the Harsimus Branch, SLH refers to a "Passaic and Harsimus Branch," or "Passaic and Harsimus Line." But as Conrail points out, the Passaic and Harsimus Branch was not formed until after Conrail took over the line. This puts the nail in the head of SLH witness Hasselman's argument that USRA made a mistake in referring to the Harsimus Branch and really meant the Passaic and Harsimus Branch.

In any event, there is no reference in the Final System Plan to a "Passaic and Harsimus Branch." At FSP p. 272, USRA designates line code 1420 Harsimus Branch, and line code 1421 Passaic Branch to Conrail. These two line codes and branch names correspond to track charts extant at the time, and to the Fairfax Leary deed.

USRA does not designate a "Passaic and Harsimus Branch" to Conrail, and there is no contemporaneous track chart for such a branch. All track charts for such a branch were created in the years after Conrail's creation. This in turn highlights the following point: SLH and Conrail basically ignore the numerous contemporaneous track corresponding to Line Code 1420, Harsimus Branch, MP 1.0 (Jersey City) to MP 7.0 (Harrison), as set forth on p. 272 of the FSP,<sup>18</sup> and instead try to bootstrap into existence some reason to argue that the Embankment (located between MP 1.3 and MP 2.5) somehow should not be included in those track charts, although it quite clearly is. Neither SLH nor Conrail present any contemporaneous track chart for a "Passaic and Harsimus Branch" (because there is none), nor any other map showing a Harsimus Branch, or a Passaic and Harsimus Branch, corresponding to MP 1.0 (Jersey City) to MP 7.0 (Harrison). There is no such map or track charts, other than the track charts on which Jersey City relies, and which USRA itself says were the basis of the designations to Conrail.

7. Conrail's claim about no through traffic is false. Conrail at p. 4 of its Reply contends there was "no through traffic" in the Harsimus Cove area, seemingly implying it was an

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<sup>18</sup> It is also noteworthy that USRA specifically referenced a "Passaic Branch," line code 1421, from WA 5 to Kearny. This also indicates the erroneous nature of SLH's argument, and the speculations of its various witnesses.

unused yard, and from this Conrail implies that it "would have made no sense" to convey the yard as a line of railroad. Half of Conrail's argument is in the nature of the question "when did you stop beating your wife?" The answer is that "I do not beat my wife." Thus, it is true that most of the yard was unused. That is why most of the yard was not conveyed to Conrail in the first place. It was excepted out of the Fairfax Leary deed. Thus to ask whether it made sense to convey the yard as a line of railroad is misleading, because most of the yard was not conveyed to Conrail at all. What was conveyed to Conrail included a line of railroad, and it is here that Conrail makes an obvious mistake. Conrail claims that there was no through traffic. But there was. It was just not traffic into a port for transshipment to Manhattan. Conrail's own documents show, as of September 1984, that more than 3000 carloads per year from at least seven shippers moved over this line. The only ingress and egress to Conrail's Hudson Street tracks serving Colgate-Palmolive, Refined Onyx, and the other five shippers listed in the document entitled "exhibit 1" and stamped in the upper left hand "055"<sup>19</sup> was over the Embankment, from MP 1.3 to MP 2.54 (Waldo) on the old track charts. The following document in the relevant Appendix, paginated "053," shows the line was highly profitable. In short, there was a huge amount of through traffic. It made eminent sense to convey this property as a line of railroad, albeit

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<sup>19</sup> Set forth in NJ OP. Appendix I.

a dead-end branch of sorts, and it was obviously so conveyed.

Ironically, SLH has its witness Hasselman claiming that the Harsimus Branch was used only as "headroom" for maneuvering trains, implying no through use at all. SLH and its witness should have looked at Jersey City's exhibits. If they had, they would see that the Memorandum dated January 28, 1985, paginated "053," is addressed to Mr. R.B. Hasselman and shows that the property in question here (by then called the Passaic & Harsimus Branch/Hudson Street Track, because, as Conrail says, it renamed the thing after acquiring it) would remain highly profitable, even after rehabilitation, and even after two shippers (Chicago Shippers and Elk Warehouse) dropped off (they had evidently announced plans to leave). As we have said, the documents in Appendix I of Jersey City's Opening Statement<sup>20</sup> show that the property at issue in this case was heavily used by multiple shippers for through traffic moving in interstate commerce for over a decade after it was transferred to Conrail.

A problem for all Conrail and SLH witnesses is that Conrail has no shipper data to make available other than the documents Jersey City presented in its Appendix I (which the Conrail and SLH witnesses evidently did not read). This left the various opposition witnesses simply to speculate. But this Board cannot

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<sup>20</sup> The document paginated "051" indicates 637 carloads from Colgate Palmolive as late as 1986, a decade after Conrail acquisition.

rely upon witness speculation and arguments by Conrail and SLH bootstrapped thereon which fly in the face of what contemporaneous documents actually show. The witness statements of Conrail and SLH are riddled with error, and must be totally discounted. More to the point, Conrail and SLH should not be permitted to speculate there was no through traffic on the line when Conrail acquired it in the face of Conrail documents showing that there were thousands of carloads of through traffic as late as 1984.

8. Conrail's illegal or confused reclassification. What Conrail essentially admits that it did was reclassify the line of railroad at issue in this proceeding as a "spur" on April 14, 1994. That is manifest in the document labelled "Spur Decisions Made by Law Department," set forth on the first page of JC Op. Appendix I. That determination is obviously not linked chronologically to the conveyance of the property to Conrail in 1976 -- it is 18 years after the conveyance. Instead, it is linked chronologically to cessation of any rail use on the Harsimus Branch between MP 1.3 and Waldo at MP 2.54. The use had been 3000 or more carloads per year of through traffic as late as 1984. Through traffic dwindled by 1986, and the last rail use was evidently made around 1992. This is just a situation in which Conrail felt it could get away with abandoning the line by reclassification, even though that is illegal. A railroad "may not lawfully reduce [the] ... line to the status of industrial spur without our permission and abandon

operation...." Clinchfield Railroad Co. Abandonment, 295 ICC 41, 44 (1955). Accord, Chelsea Property Owners, supra.

9. Other Conrail/SLH claims about what USRA conveyed or intended to convey. City believes that it has covered all the arguments raised by Conrail and SLH that either petitioners are mistaken in their reading of the FSP, or USRA was mistaken in how it wrote the FSP, or USRA somehow did not intend to do what it did in the FSP, or that Conrail is its own abandonment agency. If we missed something, that should not be deemed an admission. Instead, it means we found the claim so incredible it was not worth addressing, or we felt it had already been addressed in our Petition or Opening Statement and the documents and statements appended thereto, or was duplicative of what we covered above. As to assertions made by various SLH witnesses and Conrail's Ryan about lack of use of the Harsimus Branch, or the intent of USRA, those assertions are not in accordance with the best evidence: the FSP, the track charts, the Fairfax Leary deed, and Conrail's own documents showing heavy and profitable through use of the very property at issue here as late as 1984.

## II. Conrail/Developer "Unclean Hands" Arguments Are Without Merit

Conrail and SLH claim that the City in general encouraged redevelopment of the Jersey City waterfront during the 1980's, and as to the Embankment, was aware of lack of rail use, encouraged removal of the rail bridges, and actively pursued redevelopment of

the Embankment itself in 1998-99, but then did not pursue the matter again for several years. Conrail asserts that the City is "abusing"<sup>21</sup> or "manipulating"<sup>22</sup> STB processes by asking this Board to require Conrail to seek an abandonment authorization. SLH claims the petition is a "transparent last minute attempt"<sup>23</sup> to upset the sale to SLH, which obviously prefers to tear out the Embankment and build houses there.

While we certainly disagree with the accusatory and cynical characterizations employed by Conrail and SLH, the point is that almost all they say in the end is neither material nor relevant. There are several issues to sort out in the rhetoric from Conrail and SLH, which we will now undertake to do.

1. Trail Act agreement versus trail use. Conrail claims that this proceeding "cannot be about a Trails Act agreement because there is no trail and ... Conrail would not enter into such an agreement...." Conrail Reply at 21. Conrail made this claim in its initial response statement, and it remains as irrelevant now as it was then. An agreement under what Conrail calls the Trails Act (16 U.S.C. § 1247(d)) is needed only when the railroad holds an easement-type interest in a rail corridor that will automatically extinguish upon STB-authorized abandonment. No one disputes the

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<sup>21</sup> Conrail Reply at 19.

<sup>22</sup> Conrail Reply at 22.

<sup>23</sup> SLH Reply at 29.

fact that Conrail owned title here in fee simple absolute. Petitioners do not need a Trails Act agreement to preserve the property, and have never sought such an agreement with Conrail, and see no reason to do so.

City seeks an opportunity to buy the property from Conrail either by act of sale or by use of eminent domain as provided under 49 U.S.C. § 10905 and N.J.S.A. 48:12-125.1. No one denies that both would be applicable if Conrail had complied with the law by seeking an abandonment authorization. No one denies that Jersey City has retained a New Jersey eminent domain attorney (John Curley) to be ready to do his job when and if this Board requires Conrail to comply with the law.

This case is very much about a trail. The Embankment would be "an ideal structure" for use as part of the East Coast Greenway. See Attachment A, Cotter Statement ¶ 14. It would provide grade separation of pedestrians and trail users from busy streets across Jersey City down to the Hudson Riverfront, directly across from Manhattan. It is a once-in-a-lifetime opportunity. Conrail does not dispute that the property is suitable for a trail. Conrail simply says it wants to chop it up.

2. Historic preservation. Conrail says the petition is not about historic preservation because the "embankments" have already been determined historic. Conrail Reply at 21. Although section 106 of the NHPA may seem to Conrail like a lot of foolish



paperwork, the whole notion of compliance with section 106 is not to determine if a structure is historic, but instead is to provide an opportunity for study to ensure documentation and hopefully to allow some time for possible preservation. It is not simply a bump on the road to demolition as Conrail appears to believe.

We attach hereto (Att. C) a Verified Statement by Ron Emrich, the Executive Director of Preservation New Jersey. He states that on Tuesday, May 9, 2006 (the due date of this Rebuttal), Preservation New Jersey will announce the list of New Jersey's "10 Most Endangered Sites." One of those will be the property at issue in this case:

"The Harsimus Branch Embankment is listed because of its importance to state, regional and national history as the terminus of the Pennsylvania Railroad freightway from the American Heartland to the Hudson River in New Jersey and to the integrity of two National Historic Districts through which it runs, among other reasons. It is under threat by Conrail's sale to a private developer who has plans to demolish it."

This Board's regulations (49 C.F.R. Part 1105) require Conrail in abandonments to prepare historic reports and to file same with the State Historic Preservation Officer. This in turn results in a consultation requirement. Conrail has prepared no report, let alone filed any, and the record is bereft of any consultation. If this railroad complied with this Board's requirements, Jersey City unquestionably would have an opportunity to acquire the property during the period of consultation, and in any event would certainly be able to pursue remedies under 49 U.S.C. § 10905 and the parallel

New Jersey statute in light of what Conrail now admits is an historic structure. If the railroad were now required to comply with the law, then the Embankment would not be under such intense threat.

3. Freight rail use. Conrail claims that this proceeding is not to provide freight rail service. Conrail Reply at 21. No one is pretending that the petitioners in this proceeding are seeking to preserve the Harsimus Branch as an operating freight railroad.<sup>24</sup> Petitioners, which here include the local government, clearly have standing to insist that Conrail comply with abandonment procedures even if they are not objecting to cessation of rail service. Abandonment procedures not only protect shippers but also the public. Congress has recognized that railroad rights of way have alternative uses should rail use cease. In particular, Congress has provided a mechanism whereby the public can apply to ICC (under repealed Revised Commerce Act 49 U.S.C. § 10906) or STB (ICCTA, 49 U.S.C. § 10905) for an order barring exactly the sale here for up to 180 days subsequent to a federal abandonment authorization. Under this Board's precedent, issuance of a "public use condition" barring sale is mandatory if the showings in 49 C.F.R. § 1152.28 are made. Moreover, this Board would not permit disposition or destruction of the Embankment, since it is unquestionably eligible

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<sup>24</sup> There remains potential for light rail, and the Embankment corridor would interconnect with existing light rail along the waterfront.

for the National Register, absent compliance with NHPA 106 (16 U.S.C. § 470f). There has been no compliance here at all. If Conrail had complied with 49 U.S.C. § 10903 by seeking some form of abandonment authority (the line would have qualified for a two year out of service exemption under 49 C.F.R. § 1152.50, which would have been cheap and easy for Conrail to put together), then we would not be here today, nor would SLH be claiming ownership of the Embankment and complaining that this is some kind of last minute effort to prevent its demolition. Moreover, under New Jersey law, Conrail would have had to afford Jersey City a 90 day period to acquire the property prior to sale to SLH. By breaching the abandonment requirement, Conrail and SLH deprived not just Jersey City of its rights, but also Rails to Trails, the Coalition, Hudson County, and the public generally.

The words of the First Circuit in Reed v. Meserve, 487 F.2d 646, 649-50 (1973), are germane here:

"To assemble a right of way in our increasingly populous nation is no longer simple. A scarcity of fuel and the adverse consequences of too many motor vehicles suggest that society may someday have need either for railroads or for the rights of way over which they have been built. A federal agency charged with designing part of our transportation policy does not overstep its authority when it prudently undertakes to minimize the destruction of available transportation corridors painstakingly created over several generations."

"Converting railroad rights-of-way to trails," the Council on Environmental Quality (CEQ) has declared, "is an example of an action that can affect transportation, energy efficiency, natural

resources and historic preservation."<sup>25</sup> In the words of the Supreme Court,

"Congress apparently believed that every line was a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable. Given the long tradition of congressional regulation of railroad abandonments, ... that is a judgment that Congress is entitled to make."

Preseault v. ICC, 494 U.S. 1, 19 (1990).

4. Conrail allegation of "abuse." Conrail thinks that Jersey City and its co-petitioners are being abusive in seeking to obtain Conrail compliance with long-established federal rail abandonment law. If Conrail had wanted to protect itself from "abuse" by Jersey City, Rails to Trails Conservancy, the Coalition, or anyone else seeking to preserve the Embankment as part of the East Coast Greenway, as open space, as an historic landmark, or as a trail, then all Conrail needed to do was obtain an abandonment authorization. Once that became effective, Conrail could proceed as it wished.

But Conrail did not. In this sense, the abandonment process protects the railroad from abuse, just as it protects Jersey City, Assemblyman Manzo and his constituents, the Coalition, and Rails to Trails Conservancy from abuse. What is abusive is when the railroad fails to use the process. When that happens, the repercussion should fall on the railroad, not the public.

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<sup>25</sup> CEQ, Environmental Quality: 21st Annual Report 188 (1991).

Here Conrail apparently represented, or at least was understood to represent, that its property was immune to local eminent domain due to its railroad regulatory status as late as a meeting with City and Coalition representatives held on March 16, 2004. As Mr. Strauss says in his Verified Statement, that was puzzling, because then the proposed sale to the developer should be impossible as well, "unless Conrail first obtained abandonment authority." See Petition, Exhibit D, ¶3. Conrail (and its witness Ryan) deny making such a claim, but Mr. Robert Cotter, Planning Director for Jersey City, attended the meeting, and states that Mr. Fiorilla for Conrail said that "federal law pre-empted the city's powers of eminent domain as it affects railroads." See Cotter Statement, Attachment A hereto, at ¶ 13. Mr. Cotter explains that

"this caused considerable confusion. We did not understand how Conrail could say it was selling the property to a private developer for houses at the same time it claimed that we could not do anything about it due to federal preemption. One of the attendees at the meeting, Andy Strauss, undertook to find out if Conrail had received federal abandonment authority. It is my understanding that Mr. Strauss could not find any indication that Conrail had received abandonment authority. We hoped to avoid litigation, and we did not wish to proceed illegally by starting an eminent domain proceeding against a federally regulated rail line, because that would be an embarrassing waste of resources."

See also Attachment D (penultimate paragraph, reiterating understanding from Conrail representatives).

The City's subsequent and continued attempts at negotiation with either the railroad or the developer were fruitless. As Mr Curley has detailed in prior statements, the railroad sold the

property out from under the City while the City was seeking permission to do a final on-site appraisal inspection required for eminent domain purposes. JC Op. App. XV ¶5. This Petition followed.

5. Conrail claims about City complicity. Conrail allowed the Harsimus Branch at issue here to fall into disrepair upon its decline in use. Pieces of structure were falling off the bridges, creating a safety hazard. See JC Op. App. II. Certainly, like local officials anywhere, Jersey City officials encouraged Conrail to get the bridges removed if they were no longer in service. But this is not tantamount to sanctioning an illegal abandonment. First, removal of track and appurtenances does not mean the City is somehow complicit in an unlawful abandonment. The railroad still has to obtain abandonment authorization. Phillips v. Denver & R.G. RR, supra. Until the railroad obtains an abandonment authorization, it is subject to the risk that it will be required to restore the property for rail use. There is thus no reason for City officials to think that they are waiving abandonment procedures when they ask that useless and dangerous structures be removed. Second, local officials are entitled to assume that the railroad will comply with federal licensing requirements when it needs to do so, which is certainly by the time it sells off the underlying property interest.

Conrail cites a letter from National Bulk Carriers urging

Conrail to treat Conrail tracks on the developer's property as a "spur."<sup>26</sup> National Bulk Carriers was the redeveloper of some property in the Harsimus Cove east of former Henderson Street (i.e., property not at issue in this proceeding). It certainly would not be unusual for a developer to take such a position; SLH is doing so here. That does not mean the City took the position, or that it is the correct position. But more to the point, the letter appears to reference an easement for a spur track that Conrail held on National Bulk Carrier property east of former Henderson Street. There were spur tracks in the Cove east of former Henderson Street, and if some of those were what National Bulk meant, maybe it was right as to those. But this does not mean that the line at issue here is a spur.

What is interesting is that the National Bulk Carrier's request (dated March 30, 1994) may have precipitated Conrail's April 14, 1994 reclassification of the entire Harsimus Branch to the west of former Henderson Street as a "spur." If so, then the reclassification clearly was to accommodate a developer. It may be that Conrail felt then, or feels now, that this also accommodated Jersey City because Jersey City supported redevelopment of its waterfront and wanted the bridges removed or repaired. But this does not mean that the City was complicit in, authorized, or had the power to authorize, an illegal abandonment, or waived its

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<sup>26</sup> Conrail Reply Exhibit I.

rights, or could waive its rights. It certainly does not mean that the City waived the rights of the Coalition, Rails to Trails Conservancy, Assemblyman Manzo, or the public generally.

Although the City of course pushed for removal of useless tracks and structures, City never sought to compel Conrail to take unlawful action. Almost all the land that was redeveloped on the waterfront was either never part of Conrail, or was genuine side or spur track. But the line embodied in Line Code 1420 and the Fairfax Leary deed was not.

5. Conrail's implied claims that the City evinced no interest is wrong. What happened below is outlined in Planning Director Cotter's Statement, appended as Attachment A. Mr. Cotter recounts that the Jersey City waterfront was being redeveloped, but "[n]ot much was done in connection with the Embankment because Conrail continued to use it to turn trains, but allowed its condition to deteriorate." Cotter Statement ¶ 5. Then- Mayor Schundler viewed the area as in need of redevelopment, and the Jersey City Council agreed. Initial planning focussed on conversion of the Embankment into housing through a redeveloper acting in conjunction with the Jersey City Redevelopment Agency.<sup>27</sup> This approach would have

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<sup>27</sup> The Redevelopment Agency is separate from the City of Jersey City. It is an independent agency with those powers delegated to it under local law. NJSA 40A: 12A-1. The City, after hearings, adopts a redevelopment plan, and then the Redevelopment Agency is in charge of implementing that plan. The Redevelopment Agency does not become involved in park, open space, road, or trail acquisitions unless they are part of a



resulted in a for-profit redevelopment much like that employed on the waterfront. However, negotiations between the Redevelopment Agency and Conrail did not reach the point of working out a contract, and the issue of abandonment was never addressed.

Instead, local residents and historic preservation advocates focussed the City on the historic nature of the Embankment and its potential as a park and open space. Cotter ¶¶ 6-9. According to Mr. Richard James, the New Jersey State Historic Preservation Office issued a formal opinion that the Embankment was eligible for listing on the State and National Registers of Historic Places before it was formally nominated by him. In any event, a nomination was submitted, and in December of 1999, New Jersey listed the Embankment, and forwarded the nomination to the Department of Interior for a determination of eligibility for listing on the National Register. As Mr. Cotter reports, Mayor Cunningham came into office in 2001 as a supporter of preservation efforts. Cotter Statement, ¶ 10.

Recognition of the historic status of the Embankment essentially took the Jersey City Redevelopment Agency out of the picture. Unless specifically provided as part of a larger redevelopment plan, open space acquisition in New Jersey is

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redemption plan. Ordinarily, the Agency works with private developers to redevelop blighted areas for commercial or residential purposes. The City pursues parks, roads, libraries and so forth separately.

generally not undertaken by a redevelopment authority. Open space acquisition is generally done directly by a local or state government using public funds. Redevelopment, although mediated by redevelopment agencies, in the end is a largely private undertaking. Once the decision was made to go to open space, the City had to shift gears. See Verified Statement of Eleuterio Maldonado, Attachment 2, ¶ 6. This also means that Conrail's claims of having worked with the Redevelopment Agency are true but miss the point that after the Embankment received historic status, the public interest in it shifted from redevelopment to preservation.

Unfortunately, Conrail viewed recognition of the Embankment's historic status with hostility (Conrail opposed listing it on the National Register), and apparently viewed the effort to acquire the Embankment as a park and trail to be frivolous and misguided. Maybe Conrail just could not imagine a public amenity in Jersey City. Indeed, in its initial Reply (p. 5) to our Petition for a Declaratory Order last February, as well as here, Conrail purports to imply this case is frivolous, and will not result in trails or historic preservation or anything of public benefit. (Reading what Conrail says here, one wonders how this same railroad was such a proponent of preservation of the High Line across the river in Manhattan.)        Former Councilman Maldonado recounts that he attended a meeting with Conrail on February 6, 2003, for the

purpose of beginning negotiations for acquisition for open space use. He indicates that Conrail asked for a proposal and indorsements. Maldonado V.S. (Attachment B) ¶ 8. Although supporters sent Conrail's Ryan a package of letters from federal, state and local elected leaders pledging support for the acquisition and announcing they would seek funding (see JC Op. Appendix III), Mr. Maldonado says Embankment supporters never heard back. Maldonado ¶ 8. Although Conrail ignored the City on open space and subsequently entered into a contract with SLH, it clearly did so knowing of the City's interest, and it knew well before it contracted with SLH.

Although it claimed to have entered into a contract with SLH, Conrail did not close on that contract immediately. Instead, closing was postponed for approximately two years (perhaps the developer was not ready with funds) until July 2005. During this interval, the City raised funds sufficient to acquire the property from Conrail (JC Op. Appendix VII, Corrado ¶5). Conrail nonetheless continued to refuse negotiations (Cotter ¶ 13), thwarted the City's efforts to complete its eminent domain appraisal activities, and sold the property to LHS. JC Op. Appendix XV ¶ 4 (Curley V.S.).

Mr. Maldonado served on the Mayor's acquisition committee, and attests that the Mayor sought the property, by eminent domain if necessary. Maldonado V.S. ¶ 9. But Conrail claimed the City could

not use eminent domain due to the property's railroad status. Id. Although Mayor Cunningham died untimely, subsequent Mayors, including current Mayor Healy, continue to support acquisition. Id. ¶10.

6. SLH claims of inconsistency. SLH says the City has taken an inconsistent position in (a) failing to file an eminent domain against SLH but then (b) bringing this proceeding so it can use eminent domain against Conrail. SLH says the City should have exploited Conrail's statement to Mr. Curley that Conrail did not need abandonment authority. SLH Reply at 26. This is another set of misleading claims. First, if the property in question here is a line of railroad subject to this Board's abandonment jurisdiction, as we believe it is, then City cannot lawfully eminent domain it until this Board authorizes abandonment or otherwise issues an approval. See City of Lincoln, supra. City is thus acting properly in seeking a declaration from this Board.

Petitioners believe that City will draw considerable advantage from being able to eminent domain the property from Conrail rather than the developer. Both the now repealed Revised Commerce Act and ICCTA recognize that entities like Jersey City interested in acquiring an otherwise-to-be abandoned railroad right of way generally save money by being able to deal with a railroad directly rather than being forced to reassemble the pieces after a railroad

parses out property upon abandonment. In particular, Congress has consistently provided the remedy currently embodied in 49 U.S.C. § 10905 authorizing this Board to bar sales to developers or adjacent residents for up to 180 days in order to facilitate negotiations or condemnation for public use. New Jersey has a compatible and similar provision triggered by federal abandonment authorizations and codified at N.J.S.A. 48:12-125.1.<sup>28</sup> City expects to save taxpayers quite a bit of money if it can deal with Conrail as opposed to SLH. There is nothing wrong with that; it is what Congress and the State of New Jersey both intended. In short, if the City must use condemnation, there is nothing inconsistent with the City preferring to deal with the railroad as opposed to the developer's various entities.

As to SLH's claims that the City is acting at the "last minute," the blame seems to us to rest on Conrail. Although Conrail denies it, City and Coalition officials left their March 16, 2004 meeting with Conrail's Fiorilla and Ryan with the understanding that Conrail was claiming to be protected from eminent domain by federal rail regulation. Pet. for Dec. Order, Exhibit C (Strauss ¶ 3); Attachment A hereto (Cotter corroborates Strauss at ¶ 13). That being the case, Conrail presumably could not sell the property to SLH absent an abandonment, and the City could not eminent domain it either. Richard Strauss undertook to

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<sup>28</sup> See NJ Op. App. XV (Curley) ¶ 5.

attempt to figure out what was going on by contacting STB. He could not find an abandonment authorization. Conrail's apparent position that the Embankment was part of a line of railroad still regulated by STB was plausible, and indeed upon examination City believed it correct: that is why City is participating in this Petition for a Declaratory Order.

Conrail subsequently informed John Curley that it was taking the position no abandonment authority was required, but this was shortly before the sale. City tried to get its appraisal process completed so it could file against Conrail as a precaution, but Conrail stalled the process long enough to complete the sale. See Curley V.S. ¶¶ 4-5 in JC Op. Appendix XV. Whatever Conrail intended by all this, it is certainly understandable and appropriate for the City to respond with a petition for a declaratory order.

7. Conrail's claims about finality and repose. Conrail invokes the doctrines of finality and repose, urging that the City is too late in bringing this declaratory proceeding. Conrail Reply at 23. Virtually all STB discussion of these doctrines involve efforts to reopen old proceedings involving transfers of property, as might occur under an offer of financial assistance. Since Conrail never filed any proceeding in the first place, this declaratory proceeding obviously is not some disguised petition to reopen an old ICC or STB proceeding. Conrail thus appears to wish

to extend STB's equitable doctrine into a new area: protection of the railroad's decisions unilaterally to abandon rail lines from scrutiny if the railroad can get the property sold before anyone gets the issue to the STB.

Conrail basically asks to circumvent the law if it manages to get itself into a contract that violates the law. But the Supreme Court has instructed that

"[c]ontracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but, when contracts deal with a subject-matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240, 307-08 (1935),  
quoted in Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211,  
223-24 (1986). Conrail cannot avoid ICC or STB jurisdiction through private contract. The deal between Conrail and SLH is exactly what this Board's abandonment jurisdiction is intended to regulate.

Conrail makes two specific claims in its "equitable" arguments concerning why "repose" is appropriate. First, Conrail claims that a decision favorable to the City would place a cloud on Conrail's deal with SLH. Second, it claims that a decision favoring the City might also call into question Conrail's dealings with National Bulk Carriers and possibly other entities elsewhere in Jersey City. We will deal with each of these claims in turn.

First, petitioners are clearly "soon enough" in connection with the deal between SLH and Conrail. The Embankment remains intact.<sup>29</sup> No one claims that some innocent third party has invested in some part of the Embankment in reliance on the Conrail/SLH deal. Conrail was certainly aware of the City's interest in acquiring the line as open space for years prior to the sale, and for its own reasons decided to pursue a deal with SLH.<sup>30</sup> U.S. Senators and Congressmen as well as the Mayor were writing to Conrail's Ryan in early 2003, well before any contract with SLH. On the eve of the sale, City was trying to enter the property to complete its appraisal for possible eminent domain proceedings. JC Op. App. XV, Curley ¶¶ 4-5. This is not a situation involving reopening of an old ICC or STB proceeding ordering or authorizing a transfer of property. This involves Conrail's failure to initiate a proceeding in the first place. Railroad law involving a carrier like Conrail should not proceed on the basis of "catch me if you can."

Second, Conrail raises the question of impact on the property developed by National Bulk Carriers and possibly others along the

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<sup>29</sup> The developer agreed to halt demolition activities after removal of a pier precipitated a motion for emergency relief from Jersey City.

<sup>30</sup> SLH does not raise claims of repose, finality or reliance, but if it did, we note it was similarly was on notice. SLH evidently sought an assurance on the abandonment issue from Conrail's attorney Fiorilla prior to the sale, and Fiorilla emailed SLH representatives that Conrail took the position that the line was a spur not requiring abandonment authorization. See document paginated "059" in JC Op. Appendix I.



waterfront. But our petition before this Board puts at issue only the Harsimus Branch between Waldo and former Henderson Street (roughly MP 2.54 to MP 1.3 on the track charts contemporaneous with the transfer to Conrail). The property developed by National Bulk Carriers and others is all elsewhere to the east. This other property does not include the historic Embankment. Moreover, Jersey City through its land use planning has identified and preserved pedestrian and bicycle access across this property to the waterfront. Similarly, access has been preserved for light rail. In short, petitioners are aware of no reason why Conrail should be concerned about properties not at issue in this proceeding.

In addition, most of the property east of former Henderson Street were either not owned by Conrail in the first place, or, like trackage serving Onyx Chemical, were comprised of what truly were spur tracks<sup>31</sup> which indeed would not require abandonment authority. Petitioners accordingly do not believe that favorable action by this Board on the instant petition should, would, or could govern the result for MP 1.3 to MP 1.0. Moreover, this Board's favorable action on the City's petition would not govern equitable concerns that innocent third parties in the Cove itself might raise.

8. Other claims. Jersey City has endeavored to address all

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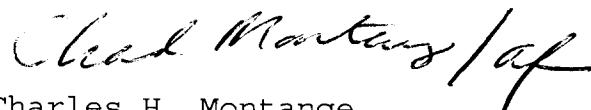
<sup>31</sup> See map from Conrail in JC Op. App I bearing stamped pagination "056."

the unclean hands and equitable concerns raised by SLH or Conrail in one fashion or another. Anything we seemed to have missed was likely judged by us as trivial or rebuffed in our Petition, Opening Statement, or the record elsewhere.

Conclusion

For the reasons stated, petitioners request that this Board grant the Petition for a Declaratory Order filed by Jersey City, the Coalition, Rails to Trails Conservancy, and Assemblyman Manzo.

Respectfully submitted,



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Attachment A: Statement of Robert Cotter  
(submitted under 28 USC § 1746)

Attachment B: Verified Statement of Eleuterio Maldonado, Jr.

Attachment C: Verified Statement of Ron Emrich

Attachment D: Supplemental Declaration of Richard Strauss

Attachment A

BEFORE THE  
SURFACE TRANSPORTATION BOARD  
WASHINGTON, D.C.

STB Finance Docket No. 34818

CITY OF JERSEY CITY, RAILS TO TRAILS CONSERVANCY, PENNSYLVANIA  
RAILROAD HARSIMUS STEM EMBANKMENT PRESERVATION COALITION,  
AND NEW JERSEY STATE ASSEMBLYMAN LOUIS M. MANZO

STATEMENT OF ROBERT D. COTTER, AICP, PP  
PLANNING DIRECTOR, CITY OF JERSEY CITY  
MAY 7, 2006

1. I am Robert D. Cotter, and I serve as the Planning Director of the City of Jersey City. I have been the director of the City's City Planning Division continuously since January of 1990. I began my service within Jersey City as a planner with the Jersey City Redevelopment Agency in July of 1980, where I served until April of 1983.

Subsequently, I transferred to the direct employ of the City of Jersey City into its planning unit, then known as "Urban Research and Design," (now the Division of City Planning) where I was employed from April of 1983 to April of 1986, whereupon I left the employ of the City of Jersey City. This statement is true and accurate to the best of my recollection. I have endeavored to review documents in my files in order to refresh my recollection.

2. Among my responsibilities in these above mentioned capacities has been the research and production of the various "blight reports" and redevelopment plans for much of the Jersey City waterfront and its inner-city neighborhoods, including the Harsimus Cove South Redevelopment Plan and the Exchange Place North Redevelopment Plan.

3. While conducting my field research in the preparation of both of the above mentioned redevelopment plans and blight studies during the summer and fall of 1983, I clearly recall observing an active rail line traversing the area of what we call the Harsimus Yards and running south along the approximate right-of-way of today's Greene Street and Hudson Street. This line served the then existing industries in this area of the

Hudson River waterfront, including Colgate-Palmolive and Onyx Chemical. This active rail line emanated from the Sixth Street Embankment.

4. During the conduct of a public hearing on January 18, 1984, at which I was the primary city staff person presenting the findings of our research on the matter of determining if the Harsimus Cove South Study Area met New Jersey's statutory criteria to be declared to be a "blighted area," a letter of objection from the Onyx Chemical Company was entered into the record of the Planning Board's hearing. Identified as "O-6, January 18, 1984," (copy attached) this letter refers to the "Conrail railroad yards and the track which services Onyx Chemical. The letter goes on to explain that, "It is the purpose of the letter to make you (the JC Planning Board) aware of the adverse impact discontinuation of such rail service would have upon my client's business (Onyx Chemical). The letter states that in the full year of 1983, over 9 million pounds of raw material were transported in 103 rail tank cars along the rail spur. I append this to show that the line was in use as late as 1984 by local industry, and local industry was opposed to abandonment of rail service. While the City was definitely interested in redevelopment of the Hudson River waterfront, the City did not intend to do so by sanctioning illegal abandonments of rail service.

5. The Harsimus Cove yards, which formerly began from roughly the end of the Embankment (former Henderson Street) to the Hudson River were not large enough for containers, and this limited their use by the 1980's to local industry. Local rail dependent industry gradually left the waterfront in the 1980's, and most of the waterfront has now been redeveloped. However, the property comprising the Harsimus Branch from former Henderson Street back to the rail lines at Waldo remained intact, and was owned in fee simple absolute by Conrail. Not much was done in connection with the Embankment because Conrail continued to use it to turn trains, but allowed its condition to deteriorate.

6. The deterioration itself was of concern, and by the late 1990's, Mayor Bret Schundler's administration viewed the area as in need of redevelopment. My office was directed to begin the steps necessary to produce a redevelopment plan for the six blocks

of the Embankment. In April of 1997, the Municipal Council adopted a resolution authorizing the Jersey City Planning Board to conduct a preliminary investigation to determine if the Sixth Street Embankment met the criteria to be declared an area in need of redevelopment, and to review and recommend a proposed redevelopment plan for the area.

7. On March 10, 1998, the Jersey City Planning Board conducted a public hearing on the matter of determining if the Sixth Street Embankment qualified as an area in need of redevelopment and determined that it did, and so recommended to the Municipal Council. On March 11, 1998, the Municipal Council adopted a resolution (copy attached) accepting the planning board's recommendation and so declared the Sixth Street Embankment to be in need of redevelopment.

8. During this time, the planning staff, myself included, was working with the neighbors to the Sixth Street Embankment to produce a redevelopment plan for the eventual replacement of the embankment with housing that would be compatible in scale and style with the surrounding community of late 19<sup>th</sup> Century brick and frame, mostly three and four story structures. While that work progressed, the administration agreed to withdraw a proposed ordinance to adopt a redevelopment plan to accomplish that end as the planning staff had not yet reached agreement with the neighborhood as to the content of such plan. A subsequent planning board meeting on April 28, 1998, ended in an adjournment and agreement to continue working with the community to secure an acceptable plan.

9. Over the next few weeks, the community began to gel around the idea of preservation of the embankment for its historic value, its potential for open space preservation, and its possible use as a non-motorized means of access to the Hudson River. It became apparent that we should be looking at uses other than merely more housing.

10. The efforts of the neighbors continued and coalesced in the formation of the Pennsylvania Railroad Harsimus Stem Embankment Preservation Coalition, and a concerted effort to secure the adaptive re-use of the embankment structure for historic preservation purposes, open space use and pedestrian and bicycle right-of-way got underway. Upon Mayor Cunningham's coming to office in July, 2001, Jersey City actively began pursuing this approach.

11. On March 13, 2003, a package of support letters was sent to Robert Ryan of Conrail by the Coalition, which expressed the willingness of the city to receive the embankment property, contingent on Conrail, CSX and Norfolk Southern being willing sellers, and the assembly of needed funding. Attached to that package was a letter signed by all nine members of the Municipal Council.

12. On May 29, 2003, Mark Munley, Director of the Department of Housing, Economic Development and Commerce, and I met with Frank Palmaccio regarding a joint purchase of the 8 parcels being offered by the railroad group. Mr. Palmaccio owned a tract of land adjacent to the westernmost parcels being offered by Conrail and he was interested in acquiring it to expand his holdings there. We in planning were interested in acquiring the Embankment for preservation. It was agreed that Mr. Palmaccio could contact Mr. Robert Ryan of Conrail, and discuss a kind of joint acquisition. Mr. Palmaccio did in fact call Mr. Ryan, and Mr. Palmaccio forwarded us a brief synopsis of his conversation with Mr. Ryan (copy attached). The memorandum indicates the dubious attitude adopted by Mr. Ryan to the City's goal of preserving the Embankment.

13. On March 16, 2004, Mayor Cunningham, myself, members of the Mayor's staff and representatives of the Embankment Coalition, met with Robert Ryan of Conrail and John Fiorilla, Esq., and discussed the city's willingness to take possession of the Sixth Street Embankment. Contingent upon funding from outside sources, Mayor Cunningham expressed support for this acquisition. Conrail claimed that it had entered into a contract with a buyer already, and would not discuss purchase with the City unless and until the contract lapsed. The City suggested that it could employ condemnation authority.



However, Conrail took exception to the idea that Jersey City could condemn the land for the public purpose of a public park, open space, and bike/ped right-of-way with Mr. Fiorilla explaining that federal law pre-empted the city's powers of eminent domain as it affects railroads. This caused considerable confusion. We did not understand how Conrail could say it was selling the property to a private developer for houses at the same time it claimed that we could not do anything about it due to federal preemption. One of the attendees at the meeting, Andy Strauss, undertook to find out if Conrail had received federal abandonment authority. It is my understanding that Mr. Strauss could not find any indication that Conrail had received abandonment authority. We hoped to avoid litigation, and we did not wish to proceed illegally by starting an eminent domain proceeding against a federally regulated rail line, because that would be an embarrassing waste of resources.

14. During this time, the city began work on a streetscape improvement project that would have enhanced the Sixth Street Embankment as a public amenity through the provision of a new sidewalk along the northern side of the Embankment where there was only dirt and weeds. My staff was assigned to make this happen, and we pursued it as a pedestrian enhancement project. Also, at this time, work was beginning in my office to pursue creation of the part of the East Coast Greenway that is supposed to be located on the Sixth Street Embankment. Use of the Embankment is ideal for this purpose, because it will provide grade-separated access for pedestrians and bicyclists as they traverse Jersey City to the Hudson River waterfront across from Manhattan. Indeed, it is an ideal structure for that purpose.

15. In March of 2004, the first application for New Jersey Green Acres funding to secure funds needed to acquire the Embankment was submitted to the NJ DEP. This request was funded in the amount of \$800,000. A subsequent application submitted in 2005 was also funded in the same amount.

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States that the forgoing is true and correct.

Executed on MAY 8, 2006

Robert D. Collier

0-6  
1/18/84  
ACED

LAW OFFICES  
**ROSEN, GELMAN & WEISS**

A PROFESSIONAL CORPORATION

GATEWAY 1  
NEWARK, N.J. 07102

(201) 622-0700

HOWARD T. ROSEN  
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PATRICK J. MCCARTHY  
WILLIAM J. BALCERSKI  
JILL L. McNISH  
JEFFREY SPICER  
DOROTHEA G. CRACAS  
JAMES H. LASKEY  
ROBERT CRANE  
ALICE GIANNI  
JILL E. HALEY  
JACK F. TROPE

January 18, 1984

Gerald Sheehan, Chairman  
Jersey City Planning Board  
26 Journal Square  
Jersey City, New Jersey 07306

Re: Harsimus Cove South Blight Report

Dear Mr. Sheehan:

I represent Onyx Chemical Company, 190 Warren Street, Jersey City, New Jersey, with respect to the matter pending before you concerning the Harsimus Cove South Blight Report and Redevelopment Plan.

In the introduction to the Redevelopment Plan document, dated December 28, 1983, reference is made to the Conrail railroad yard and the track which services Onyx Chemical. It is the purpose of this letter to make you aware of the adverse impact discontinuation of such rail service would have upon my client's business.

The data herewith presented is based on the full year 1983. In that period 9,317,000 pounds of raw materials were delivered directly into our plant, transported in 103 rail tank-cars along the rail spur. Should this means of delivery not be available, additional freight costs would total over \$92,000.

More importantly for area residents, elimination of tankcar deliveries would compel use of an additional 233 tank truck deliveries to transport the same amount of tonnage now carried by rail, thereby increasing such deliveries by approximately 30% over current traffic.

If the Planning Board does determine that a declaration

- Page 2 -

January 18, 1984

of blight is appropriate for the area under study, we request that a specific exclusion be made for the Conrail spur. It should also be noted that other major industrial facilities, as well as Onyx Chemical, would be harmed by termination of the described service.

Please make this letter a part of your record of comments at public hearings.

Thank you for your courtesy.

Very truly yours,

*Albert Burstein*

Albert Burstein

AB/fc

C.C. John J. Burke, Executive Vice President  
Onyx Chemical Company

Dennis Sadlowski, Esq.

## Resolution of the City of Jersey City, N.J.

City Clerk File No. Res. 98-872  
 Agenda No. 10.6  
 Approved: DEC 9 1998



## TITLE:

**RESOLUTION OF THE MUNICIPAL COUNCIL OF THE CITY OF JERSEY CITY  
 CORRECTING A RESOLUTION DECLARING THE SIXTH STREET STUDY AREA AN  
 AREA IN NEED OF REDEVELOPMENT**

WHEREAS, the Municipal Council of the City of Jersey City, has, by Resolution, authorized the Jersey City Planning Board to conduct a preliminary investigation to determine if the Sixth Street Study Area meets the criteria of New Jersey's Local Redevelopment and Housing Law, *NJSA 40A:12A-1 et seq.*, and can be declared an area in need of redevelopment; and

WHEREAS, the Planning Board, at its meeting of March 10, 1998, which meeting was properly noticed as required by law, did conduct an investigation into the conditions affecting the property in question, and did approve a motion to recommend to the Municipal Council that the referenced area be so declared; and

WHEREAS, the Planning Board's recommendation is based on evidence presented to them and contained in the Study Report prepared by the City Planning Division, and testimony of interested parties attending said Planning Board meeting; and

WHEREAS, the Planning Board did find, and so recommends to the Municipal Council, that the area in question meets the statutory criteria of *NJSA 40A:12A-5. b., d., and e.*;

WHEREAS, the Municipal Council Resolution 98-140 adopted on March 11, 1998 included a typographical error, to wit, it listed sections b., c., and d. as the legislative criteria justifying the declaration of redevelopment need when, in fact, the Study Report adopted by the Municipal Council and recommended by the Planning Board proved that the Study Area met the criteria of *NJSA 40A:12A-5. b., d., and e.*;

NOW, THEREFORE, BE IT RESOLVED by the Municipal Council of the City of Jersey City as follows:

1. That the Municipal Council corrects the record to identify *NJSA 40A:12A-5. b., d., and e.* as the criteria met and included within the Planning Board Study Report and that the Study Area is declared and re-confirmed as an area in need of redevelopment.

CERTIFIED to be a true copy of  
 RESOLUTION adopted by the  
 Municipal Council of the city of  
 Jersey City at its meeting of 12/9/98

Robert D. Cotter, PP, Director  
 Division of City Planning

APPROVED  
 CITY CLERK

APPROVED:

Business Administrator

APPROVED AS TO LEGAL FORM

James J. DeGisi, 12/9/98  
 City Corporation Counsel

Certification Required ☐

Not Required ☒

APPROVED 9-0

RECORD OF COUNCIL VOTE ON FINAL PASSAGE 12/9/98											
COUNCILPERSON	AYE	NAY	N.V.	COUNCILPERSON	AYE	NAY	N.V.	COUNCILPERSON	AYE	NAY	N.V.
CAVANAUGH	<input checked="" type="checkbox"/>			GAUGHAN	<input checked="" type="checkbox"/>			COLON	<input checked="" type="checkbox"/>		
DONNELLY	<input checked="" type="checkbox"/>			VEGA	<input checked="" type="checkbox"/>			SMITH	<input checked="" type="checkbox"/>		
BETTINGER	<input checked="" type="checkbox"/>			HOLLOWAY	<input checked="" type="checkbox"/>			DeGISE, PRES.	<input checked="" type="checkbox"/>		

/Indicates Vote

N.V.—Not Voting (Abst.)

Adopted at a meeting of the Municipal Council of the City of Jersey City, N.J.

Thomas A. DeGisi, President of Council

Robert Byrne, City Clerk

JUN 17 2003

May 30, 2003

TO: Mark Munley (Director, Jersey City Housing, Economic Development and Commerce) 30 Montgomery Street (Suite 900)  
Jersey City, NJ 07302-3821

FROM: Frank Palmaccio  
201-206-7887 (phone)  
201-858-0853 (fax)

RE: CONRAIL PROPERTY

Thank you for the time you and Mr. Cotter afforded me yesterday per our meeting regarding the acquisition of Conrail property.

Pursuant to your request for me to act as an intermediary between Conrail and Jersey City in order to facilitate a potential deal, this letter summarizes my telephone conversation of 5/30/03 with Mr. Bob Ryan (Director of Real Estate, Conrail).

Please note, per your instruction I prefaced my conversation by indicating to Mr. Ryan that I was acting only as an interested party in hopes of re-opening an unproductive relationship that may prove fruitful for all concerned.

The following points were discussed with applicable responses:

1) Jersey City will be ordering an appraisal on subject property.  
Reply: He was happy to hear this. Mr. Ryan asked by who and when?

2) With regards to letter Conrail received which had negative connotations.

Reply: He was more put off by Jersey City's lack of follow-up.

3) Jersey City will be submitting applications for grant money.

Reply: When, by who, and how much?

4) Abandonment Environmental Issues - I asked Mr. Ryan to provide me with information/steps of process involved.

Reply: He requested Jersey City law department request in writing and he would instruct Conrail's council to reply in detail. With respect to environmental, he intimated studies were done 3-4 years ago (illegally) by Jersey City and to his knowledge they were inconclusive. He added that Conrail would permit Jersey City to conduct whatever studies they wanted providing necessary paperwork was signed by Jersey City. He also added that railroad properties historically do not inheritantly have significant environmental issues.

5) Would Conrail consider a long-term lease or combination purchase/finance arrangement?

Reply: Yes, if a good percentage of money was put up front. I then explained to Mr. Ryan the City's plight and lack of funds available presently. However, I then indicated to him that the following monies

are presently available:

\$200K - Between myself and other property owner

\$250K - Acquisition money from Embankment Committee

Mr. Ryan asked if this property is so important to Jersey City, why don't they free up some money from somewhere else?

My response: I would speak to you, Mark, why not utilize the \$700K (+/-) earmarked for the street-scape project for the Conrail parcels? I would think that Jersey City residents would be very happy to put off the street-scape project in order to resolve this issue. And, if added to current collective bankroll, the following monies would then be available:

\$200K - Between myself and other property owner

\$250K - Embankment acquisition money

(+/-) \$700K - Street-scape budget

\$1.15 Million

After speaking to Mr. Ryan and Mr. Fiorilla over the last six months, I firmly believe that if a collective offer with \$1.15 million cash was presented, that Conrail would be willing and flexible on the balance and terms of the transaction.

In closing, Mr. Ryan expressed a strong desire to work out negotiations and requested that Jersey City send a letter to him with specific particulars which would show Conrail a desire to move forward rather than the current status.

Mark, assuming the current administration truly wants to acquire this property and not have this messy situation linger for years, I am very confident that a deal can be struck. Kindly give me a call to discuss further and I look forward to our next meeting with all parties involved.

Sincerely,



Frank J. Palmaccio

cc: Bob Cotter (J. City, Director of City Planning)  
Alex Booth (J. City Legal Department)  
Stephen Gucciardo (Commissioner, Embankment Committee)  
Lucianno/Alberto (A&L Auto Shop)

SENT BY: CHARLES H MONTANGE;

206 546 3739;

MAY-9-06 4:26PM;

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Attachment B



## BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 34818

City of Jersey City,  
Rails to Trails Conservancy,  
Pennsylvania Railroad Harsimus Stem  
Embankment Preservation Coalition,  
and NJ State Assemblyman Louis M. Manzo, petitioners --  
Petition for a Declaratory Order

VERIFIED STATEMENT OF  
ELEUTERIO MALDONADO, JR.

I, Eleuterio Maldonado, Jr. make this Verified Statement in support of the Petition for a Declaratory Order filed by petitioners City of Jersey City, et al., in the above-captioned proceeding.

1. I, Eleuterio Maldonado, Jr., am presently serving as Deputy Executive Director of the Hudson County Improvement Agency (HCIA), an autonomous public agency with broad responsibilities in solid waste management, recycling, affordable housing, and transportation management in Hudson County. In the capacity of Deputy Executive Director, I also serve as Director of the Hudson Transportation Management Association (TMA), a division of the HCIA.

2. Jersey City has a Mayor and Council form of government, with a Councilperson representing each of six wards in the City and three additional Councilpeople representing the City

at large.

3. Between July 1, 2001, and June 30, 2005, I served as the Councilman representing the approximately 41,000 residents of Ward E, the area of Downtown Jersey City through which the easternmost segment of the Harsimus Branch, and its Embankment, runs.

4. When I was elected Councilman, I was very familiar with issues relating to the Embankment. Given the redevelopment of the Jersey City waterfront, it was obvious that something had to be done with the Embankment. Conrail had not invested in it since rail use ceased in the 1990's, and the City viewed it as a blighted area. The railroad was allowing trash to collect and billboards to accumulate on it. Because the surrounding land use was residential, Mayor Bret Schundler's response, which was a standard response, was to consider developing the Embankment for additional housing. However, this would have required the Embankment's removal. The historic significance of the Embankment was quickly recognized, which is not surprising since the Embankment itself abuts two National Historic Districts in the City.

5. By the time I was elected Councilman in 2001, the Embankment had received state and national recognition through listing on the State Register of Historic Places and eligibility for the National Register.

6. In order to preserve a property like the Embankment as a park and recreational facility, one has to take a different approach and seek different sources of funding than one pursues for an ordinary redevelopment plan to construct offices or residential dwellings. The Jersey City Redevelopment Agency no longer was the proper vehicle to put a program together. Instead, the City had to seek financial support from federal and state grant-making authorities. Throughout my service as Councilman, I worked closely with public officials and local citizens to do exactly that: come up with the funding to meet Conrail's purchase price requirements. Fortunately, we were successful. Unfortunately, Conrail, although it knew of our interest, sold the property to SLH Properties.

7. I understand that Conrail is contending the City of Jersey City showed little interest in Embankment acquisition before it granted an option contract and then sold the property to a developer. That is not correct. Conrail was apprised of our interest but chose to pursue other interests. From my time in office until now, I witnessed continuing progress by the City of Jersey City to preserve the Embankment by acquiring it for public use, until Conrail sold it to be removed and broken up into houses. I candidly did not expect this, because Conrail had worked to preserve a similar structure in Manhattan, and

Jersey City planned to pay Conrail as much as it would get from breaking the Embankment up.

8. I personally attended the first meeting organized by the Embankment Preservation Coalition to discuss with Conrail possible acquisition of the Embankment by a public entity, presumably the County or City, with the help of private citizens. Conrail was represented by Robert Ryan, Real Estate Director, and John Fiorilla, Counsel. The date of the meeting was February 6, 2003. Conrail asked the Coalition to put a proposal in writing to them, and include endorsements from City officials, by mid-March 2003. It is my understanding that the Coalition complied with this request but did not hear back from Conrail.

9. Mayor Glenn Cunningham, who succeeded Mayor Schundler, pledged during his campaign to preserve the Embankment, and during his term established an acquisition committee comprising city officials, including myself, and citizens. Mayor Cunningham told Conrail the City would acquire the property, by eminent domain if necessary. It is my understanding that Conrail claimed the City could not do so because of the property's railroad status.

10. After Mayor Cunningham's untimely death in office, Interim Mayor L. Harvey Smith and Mayor Jerramiah Healy, the current mayor, continued our successful efforts to raise the

money necessary to acquire the property.

11. The Municipal Council on which I served repeatedly passed measures supporting preservation and acquisition. Among those measures are the following.

A. April 10, 2002, Resolution 02-270, directing the Historic Preservation Commission and Planning Board to review and comment on a Nominating Application to designate the Pennsylvania Railroad Harsimus Stem Embankment as a local Historic Landmark.

B. January 22, 2003, Ordinance 03-010 adopting amendments to the City Code, Chapter 345, Land Development Ordinance, designating the Embankment as a Municipal Landmark.

D. September 8, 2004, Ordinance 04-096 authorizing the City to acquire by purchase or condemnation property commonly known as the Sixth Street Embankment

E. February 9, 2005, Resolution 05-112 authorizing submission of Green Acres grant for Embankment acquisition.

F. May 18, 2005, Resolution 05-399, authorizing submission of a grant application to the County of Hudson for open space funds to acquire Conrail property known as the Pennsylvania Railroad Harsimus Stem Embankment.

G. June 8, 2005, Ordinance 05-064 authorizing the City to acquire by purchase or condemnation one additional parcel in property commonly known as the Sixth Street Embankment.

H. June 22, 2005, Resolution 05-510 authorizing a professional service contract to Geod Corporation in connection with a boundary survey of Conrail property commonly known as the Sixth Street Embankment.

12. In addition to these Council activities, the Planning Board and Historic Preservation Commission held hearings and made recommendations relevant to the Embankment. Public notices of each of these meetings as well as the Council Meetings were published, and in addition Conrail received special notice of some measures. Conrail representatives appeared at several of these meetings, so they were quite aware of the City's interest in preservation and acquisition.

13. I understand that Conrail and SLH are contending or implying that the City may have been complicit in its de facto abandonment. The focus of a city official is to get a blighted condition addressed. We would naturally assume that Conrail would comply with whatever legal requirements were applicable, in terms of rail regulation. I certainly was not an expert in it. Although I wished Conrail to sell the Embankment to the City or some other public agency for preservation, it was never my understanding that the City had ever entered into some kind of understanding with Conrail that Conrail could or should illegally abandon the Embankment.

without complying with applicable requirements that the railroad first obtain abandonment authorization from the Interstate Commerce Commission or the Surface Transportation Board. In short, we certainly wanted blight removed, but we never intended this to mean that we waived our legal rights as respects federal regulation of the property in question.

Pursuant to 28 U.S.C. § 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 5-7-06

  
Eleuterio Maldonado, Jr.

Attachment C



05/08/2006 12:27 6093926418

PNJ

PAGE 04

## BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 34818

City of Jersey City,  
Rails to Trails Conservancy,  
Pennsylvania Railroad Harsimus Stem  
Embankment Preservation Coalition,  
and NJ State Assemblyman Louis M. Manzo, petitioners --  
Petition for a Declaratory Order

VERIFIED STATEMENT OF  
RON EMRICH

I, Ron Emrich, make this Verified Statement in support of the Petition for a Declaratory Order filed by petitioners City of Jersey City, et al., in the above-captioned proceeding.

1. I, Ron Emrich, am Executive Director of Preservation New Jersey, a statewide nonprofit organization founded in 1978 and dedicated to preserving New Jersey's historic resources.

2. For twelve years, Preservation NJ has issued a "10 Most Endangered Historic Sites" list of precious sites throughout the state that are under threat and may be lost unless quick and concerted efforts are undertaken by public and private organizations and individuals.


3. On Tuesday, May 9, 2006, Preservation NJ will be

announcing the 2006 "10 Most Endangered Sites" on the steps of the State House in Trenton and posting the list on the website, [www.pnj10most.org](http://www.pnj10most.org). The Pennsylvania Railroad Harsimus Stem Embankment is among these sites.

4. The Harsimus Branch Embankment is listed because of its importance to state, regional and national history as the terminus of the Pennsylvania Railroad freightway from the American heartland to the Hudson River in New Jersey and to the integrity of two National Historic Districts through which it runs, among other reasons. It is under threat by Conrail's sale to a private developer who has plans to demolish it.

Pursuant to 28 U.S.C. § 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 2006

  
Ron Emrich

Attachment D

### **Supplemental Declaration of Andrew L. Strauss**

My name is Andrew L. Strauss and I reside at 101 Effingham Rd., Yardley, PA, 19067. I am licensed professional planner and principal of the firm, Strauss and Associates / Planners, 200 West State St., Trenon, NJ, 08608. I hold a masters degree in city and regional planning from the University of Pennsylvania (M.C. P. 1988). I have been a practicing land planner since 1988.

My professional experience includes four years as a policy advisor to Governor Thomas H. Kean (1986-1990), where I was responsible for land use and housing finance, and five years as New Jersey project manager for the Trust for Public Land (1990-1995), where I was responsible for managing real estate projects to benefit public access and resource conservation. Since 1995 I have served as Principal of Strauss and Associates / Planners, a private consulting practice that focuses on land use planning and acquisition matters.

On Thursday, May 4, 2006 I traveled to the National Archives and Records Administration (NARA), located in College Park, MD. I have attended to various railroad client and research projects at NARA since 2000, and last visited NARA for the subject client Embankment Coalition in the summer of 2004. The purpose of my recent trip was to locate and review documents referenced in Heffner / Hand / Ryan VS submitted by Conrail or Intervenor SLH in F.D. 34818 and to determine if National Archives had any maps or track charts contradicting the maps attached to the Fairfax Leary deed to Conrail for Line Code 1420 or the track charts for the Harsimus Branch inconsistent with the track charts for the Harsimus Branch submitted by Jersey City, et al. in F.D. 34818. Accompanying me were two members of the Embankment Coalition; Ms. Maureen Crowley and Mr. Richard James.

Prior to embarking on the NARA trip I exchanged voicemail messages with the Cartographic Archivist, Richard Smith. Upon arrival, Mr. Smith and his assistant, Mr. Keith Kerr delivered a cart containing Maps Certified to the Special Court (USRA). I reviewed said maps, which consisted of 10-12 bound Addenda referenced as I-A-23 and I-A-24. The UNJRR Maps V-1.01 / ST-1 and V-1.01 / ST-2 did not contain milepost numbers keyed to the line(s) of rail.

I viewed the handwritten notations upon the maps covering the section of the Harsimus Branch from former Henderson Street to Waldo. On the upper right hand corner of Valuation Map V-101 / ST-2 there is notated "LC 1420 MP 1.0" indicating that this section was part of the Line Code 1420 conveyance to Conrail.

During my visit to NARA I met with David Pfeiffer, Archivist, Civilian Records. Mr. Pfeiffer is the senior railroad archivist and author of Reference Information Paper 91, "Records Relating to North American Railroads" (2004). Mr. Pfeiffer was unaware of any NARA index record or compendium of Line Code data per the USRA Final System Plan.

I also examined the archival Valuation Maps and Engineering Reports pre-dating the USRA Final System Plan and Conrail conveyance. In reviewing the Engineering Report for Valuation Section V-1.01 (Harsimus Branch) as submitted by the Pennsylvania Railroad to the Interstate Commerce Commission (ICC), I was able to determine that the Harsimus Branch from Waldo to the Hudson River was subdivided into a "First Main Track" of 1.478 miles; and "Other Main Tracks" totaling 2.346 miles; followed by "Yard Tracks & Sidings" of 39.841 miles. The First Main Track was separate from other tracks, including Other Main Tracks, Yard Tracks and Sidings.

Finally, I researched the origin of the Valuation Maps for the subject Harsimus Branch by pulling ICC-filed prints covering V-1.01 / SH-1 and V-1.01 / SH-2 of the Pennsylvania Railroad (United New Jersey Railroad and Canal Company). It comes as no surprise that the Harsimus Branch, as delineated by Valuation Maps and Engineering Reports, substantially predates the FSP and conveyance of the line to Conrail. I could find no documentation per Valuation Maps, Engineering Reports or USRA Final System Plan to indicate that the Harsimus Branch was treated as

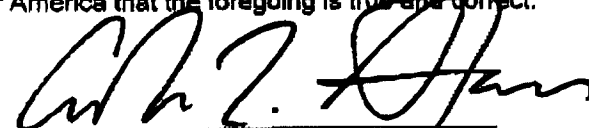
"property ancillary to the old UNJRCC main line" as stated in Paragraph 8 of the Verified Statement of Mr. Robert Ryan, Conrail.

I found nothing to indicate that USRA in its reference to Line Code 1420 at p. 272 of the Final System Plan intended to treat the portion of the Harsimus Branch from Waldo to former Hendersen Street any differently from the rest of the Harsimus Branch being conveyed as a line of railroad.

Finally, I understand that representatives of Conrail claim they did not inform representatives of the City and the Coalition that the Embankment was not susceptible to eminent domain because of its regulatory status at our meeting on March 16, 2004. I reiterate that I so understood them. This confused me, for I could not understand how Conrail could purport to sell the property to a developer in that event. I undertook an extensive research project, including contacting the Surface Transportation Board to determine whether and when Conrail had filed an abandonment proceeding.

Pursuant to 28 U.S.C. 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signature:



Dated:

5.9.06